



**STATE OF NEW JERSEY**

In the Matter of Anthony Davis and  
Clifford Rogers, Jr., Fire Captain  
(PM1110S), East Orange

CSC Docket Nos. 2018-2753 and  
2018-3754

**FINAL ADMINISTRATIVE ACTION  
OF THE  
CIVIL SERVICE COMMISSION**

Bypass Appeals

**ISSUED: APRIL 1, 2019 (CSM)**

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Anthony Davis and Clifford Rogers, Jr. appeal the bypass of their names on the Fire Captain (PM1110S), East Orange eligible list. These appeals have been consolidated due to common issues presented

Davis, a non-veteran, took the subject promotional examination, achieved a passing score, and was ranked #2 on the resultant eligible list. Rogers, a non-veteran, took the subject promotional examination, achieved a passing score, and was ranked #1 on the resultant eligible list. The appellants' names were certified to the appointing authority on January 22, 2018. In disposing of the certification on April 23, 2018, the appointing authority bypassed the appellants, who were listed in the first and second position on the PL180071 certification, and appointed the eligibles in the third through tenth positions.

In his appeal postmarked March 15, 2018 to the Civil Service Commission (Commission), Davis states that he is appealing the Fire Captain promotions "that took place on March 5, 2018."<sup>1</sup> He states that he was bypassed on the subject certification and a previous certification "without a reason or for cause." Davis indicates that he has served as an "acting" supervisor on various occasions for which he has been paid and questions if his bypass is "personal or not against me." Davis concedes that he "did have incidents in his file that [could have] hurt [his]

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<sup>1</sup> Although certification PL180071 was returned by the appointing authority on March 15, 2018, it was not recorded as disposed by this agency until April 23, 2018. As such, Davis' appeal was technically premature since it was received prior to the date the certification was recorded as disposed.

promotion the first time, but it was years ago and [he] had already been disciplined for that incident.” In support of his appeal, the appellant provides a listing of the various incidents where he served as an acting capacity.

In his appeal postmarked June 22, 2018, Rogers states that he has served in an acting capacity for two years without incident. He asserts that candidates who scored lower than he, some of whom do not have “the acting experience as I do,” were promoted. Finally, Rogers states that he was informed by agency staff that he should wait until the list was disposed to know exactly what he is appealing.

In response, the appointing authority states that it could bypass the appellants in accordance with *N.J.A.C.* 4A:4-4.8. In this regard it emphasizes that it properly exercised its discretion in accordance with the “Rule of Three,” and appointed lower-ranked eligibles.

Although provided the opportunity, the appellants did not present any additional argument or information for the Commission to consider in this matter.

## CONCLUSION

*N.J.S.A.* 11A:4-8, *N.J.S.A.* 11A:5-7, and *N.J.A.C.* 4A:4-4.8(a)3ii allow an appointing authority to select any of the top three interested eligibles on a promotional list, provided that no veteran heads the list. *N.J.A.C.* 4A:2-1.4(c), in conjunction with *N.J.A.C.* 4A:4-4.8(a)3, provides that the appellant has the burden of proof to show by a preponderance of evidence that an appointing authority’s decision to bypass the appellant on an eligible list was improper. As long as that discretion is properly utilized, an appointing authority’s decision will not be overturned.

Additionally, *N.J.A.C.* 4A:2-1.1(b) provides that an appeal must be made within 20 days after the appellant has notice or should have reasonably have known of the decision, situation, or action being appealed. Davis indicated in his premature appeal postmarked March 15, 2018 that he was appealing the appointments that were made effective March 5, 2018. The appointing authority returned the certification to this agency on March 15, 2018, but it was not recorded as disposed until April 23, 2018. Therefore, the 20-day time frame to file an appeal for this certification would begin on April 23, 2018. As such, Rogers’ appeal, which was postmarked June 22, 2018, is clearly untimely as it was filed 41 days after the required time frame.

Since the appellants, who are non-veteran, were the first and second listed names on the certification, it was within the appointing authority’s discretion to select any of the top three eligibles on the certification. As noted above, the burden of proof in bypass appeals is on the appellant. Even assuming *arguendo* that

Rogers filed a timely appeal, neither he or Davis provided any evidence to show that the appointing authority's decision to bypass them was improper. Rather, each state that they have served in "acting" capacities at various time. Initially, Civil Service laws and rules do not recognize "acting" titles. Further, neither appellant provide the names of any individual who they claim do not have the same "acting" experience or document how their "acting" experience is superior to the eligibles who were selected. Significantly, the appellants also have not even asserted in their appeals that their bypasses were based on some discriminatory and retaliatory motivation by the appointing authority.

Additionally, the appellants do not possess a vested property interest in the position. The only interest that results from placement on an eligible list is that the candidate will be considered for an applicable position so long as the eligible list remains in force. *See Nunan v. Department of Personnel*, 244 N.J. Super. 494 (App. Div. 1990). Other than their mere allegations that their "acting" experience may be somehow superior to other unnamed individuals, the appellants have not presented any substantive evidence regarding their bypass that would lead the Commission to conclude that the bypass was improper or an abuse of the appointing authority's discretion under the "rule of three."

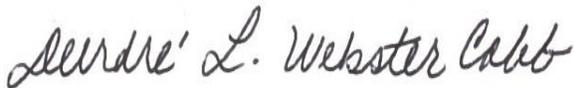
Accordingly, a thorough review of the record indicates that the appointing authority's bypass of the appellants' name was proper, and the appellants have failed to meet their burden of proof in this matter.

### ORDER

Therefore, it is ordered that these appeals be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE  
CIVIL SERVICE COMMISSION ON  
THE 27<sup>TH</sup> DAY OF MARCH, 2019



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